

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2005-0270, Ralph Cosseboom & a. v. Town of Cornish, the court on July 13, 2006, issued the following order:

Jeffrey Lamoureux, an intervenor in this case, appeals an order of the trial court reversing the decision of the Cornish Zoning Board of Adjustment (ZBA) to grant a use variance requested by Lamoureux and Denis Demers. He argues that the trial court: (1) unreasonably failed to show proper deference to the ZBA; (2) confused the use of the garage with the use of the site; and (3) erred in finding that there was no unnecessary hardship to justify the variance. He also argues that he had a constitutional right to continue the non-conforming use. We will not consider the constitutional issue as it was neither raised before the trial court nor contained in the intervenor's notice of appeal and has therefore not been preserved for appellate review. See State v. Blackmer, 149 N.H. 47, 48-49 (2003). The intervenor's appeal of the ZBA's denial of his request for a special exception was dismissed by the trial court; he has not appealed that ruling. Plaintiffs Ralph and Lorraine Cosseboom cross-appeal, arguing that the trial court erred in granting Lamoureux's motion to intervene, which was not filed until after the trial court issued its decision on the merits. We will assume without deciding that the trial court properly granted the motion to intervene. We affirm.

The factual findings of the ZBA are deemed prima facie lawful and reasonable and will not be set aside by the trial court absent errors of law unless the court is persuaded by the balance of probabilities, on the evidence before it, that the ZBA's decision is unreasonable. Harrington v. Town of Warner, 152 N.H. 74, 77 (2005). We will uphold the trial court's decision on appeal unless it is not supported by the evidence or erroneous as a matter of law. Id.

To obtain a use variance, a landowner bears the burden of establishing that: (1) the variance will not be contrary to the public interest; (2) special conditions exist such that literal enforcement of the ordinance results in unnecessary hardship; (3) the variance is consistent with the spirit of the ordinance; (4) substantial justice is done; and (5) granting the variance will not diminish the value of surrounding properties. Id. To establish unnecessary hardship for a use variance, the applicant must show that: (1) the zoning restriction as applied interferes with the applicant's reasonable use of the property, considering the unique setting of the property in its environment; (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and (3) the variance would not injure the public or private rights of others. Id. at 78.

The trial court concluded that the ZBA's decision was unreasonable, finding that an automobile repair business was: (1) not a permitted use in the rural district; (2) not permitted by special exception; and (3) not like any other use in the rural neighborhood. The court further found that the rural neighborhood consisted "entirely" of the residences and woodland contemplated by the zoning ordinance. The court also found that the proposed use was not grandfathered. See Town of Cornish Zoning Ordinance, Article VII.B.3. The record before us supports the trial court's findings that the intervenor failed to satisfy his burden to demonstrate that the variance would be consistent with the spirit of the ordinance and that no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property. See Harrington, 152 N.H. at 77.

Based upon the extensive record before us and the intervenor's description of his proposed use of the property, we also find no merit in his attempt to distinguish between the use of the garage and the use of the site.

Affirmed.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.

**Eileen Fox,
Clerk**